85-574 (3)

No.

Supreme Court, U.S.
FILED
SEP 30 1985
JOSEPH F. SPANIOL, JR.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MAURICE THOELE, LOUIS ARADO, HUGH HERATY, GARVIN NIX, JOSEPH LORENZ, MICHAEL GRIEGEL, WILLIAM McCORRY, DENNIS JYRKOWSKI, JOSEPH MUCIA, ROBERT MURRAY, JAMES ORR, RICHARD KIMBLE, JOHN KACHKA, ALEX McCRAE, FRANK SADLER, THOMAS MINASOLA, GEORGE HEAD, LEONARD MIJKA, JOHN VOLLAND, RONALD JABLON, RICHARD RICCIO, ARTHUR BISCHOFF, JAMES GEOGHEGAN, JOHN DUFFY, DANIEL McCRORY, WILLIAM DEVONEY, ROY WALKER, ALBERT POHL, ROBERT KEATING, RUSSELL ALONGI, KENNETH BRINGE, JOHN CULLOTON, JOHN TOLLEY, JOHN J. MURPHY, HUGH O'MALLEY, CARL NEUMULLER, JAMES BEGLEY, JAMES MORGAN, WILLIAM O'BRIEN, RAYMOND GREENWOOD, THOMAS CRONIN, THOMAS BRADY, TERRENCE McCUE, ROBERT TILL, FRANKLIN CRAWFORD, RAYMOND GIEHOOB, DANIEL MORAN, PATRICK LOGAN, TERRENCE FORBES, RALPH MORETH, JAMES P. BROWN, PAUL C. CEFFALIO and CHARLES R. LOFTUS, individually and on behalf of all others similarly situated,.

Petitioners,

v.

CITY OF CHICAGO, CHICAGO POLICE DEPARTMENT, RICHARD J. BRZECZEK and CHARLES H. POUNIAN,

Respondents.

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MAURICE THOELE, et al.,

Petitioners,

VS.

CITY OF CHICAGO, et al.,

Respondents.

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 84-2284

WILLIAM C. BIGBY, et al.,

Plaintiffs,

and

MAURICE THOELE, et al.,

Intervening Plaintiffs-Appellants,

v.

CITY OF CHICAGO and
CHICAGO POLICE DEPARTMENT,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 80 C 5246—**Prentice H. Marshall,** *Judge.*

ARGUED APRIL 18, 1985—DECIDED JULY 1, 1985

Before CUDAHY and POSNER, *Circuit Judges,* and PELL, *Senior Circuit Judge.**

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* Pursuant to Circuit Rule 16(e) (rehearing en banc, *sua sponte,* before decision), this opinion was circulated, before publication, to all the judges of the court in regular active service, because it overrules *DiIulio v. Board of Fire & Police Comm'rs,* 682 F.2d 666 (7th Cir. 1982). No judge voted to hear the case en banc.

POSNER, *Circuit Judge.* A group of black police sergeants brought suit against the City of Chicago under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, alleging that the City had discriminated against them by refusing to promote them to lieutenant, because they had failed a lieutenants' examination which they contended was racially biased. A group of white and Hispanic police sergeants was allowed to intervene in the suit, to challenge the exam on a different ground: that it simply was not related to what a lieutenant does, and therefore violated the intervenors' rights under the due process clause of the Fourteenth Amendment. The district judge, after a bench trial, held in favor of the plaintiffs (the black sergeants) but against the intervenors. The judge's entire discussion of the intervenors' claim is as follows: "Although we have found defendants' 1977 lieutenants examination invalid under Title VII, it does not follow that it was arbitrary and capricious so as to entitle the intervenors, Maurice Thoele, et al. to recover under the Due Process Clause of the fourteenth amendment. While they may be the beneficiaries of the Bigby plaintiffs' victory, they are not entitled to any relief in their own right." They appeal.

It might seem that as "beneficiaries" of the plaintiffs' victory (from which, incidentally, the defendants have not appealed), the intervenors would have no standing to complain that the district court had failed to award them "relief in their own right"; it might seek that by knocking out the exam the plaintiffs had gotten everything the intervenors wanted. But the district judge ordered the immediate promotion of 11 black sergeants to lieutenant. If he had found that the intervenors' constitutional rights had been infringed as well as the plaintiffs', he surely would have ordered some of the intervenors promoted immediately, instead or in addition. Their claim is not moot.

The district judge rejected the claim on the ground that the lieutenants' examination was not arbitrary or capricious. But the basis of this conclusion is unexplained. The opinion contains many devastating criticisms of the lieu-

tenants' examination en route to the conclusion, apropos the black sergeants' claim, that the exam is not "job related" within the meaning of cases interpreting Title VII. It is true that an exam might fail to survive the exacting scrutiny to which Title VII subjects examinations that have a disproportionate impact on a protected group such as blacks yet still not be so unreasonable as to create constitutional doubts unrelated to discrimination. Indeed, it would be quite odd if Title VII provided the measure of what is due process of law in public employment. This must have been what the judge thought. But what is unclear from the district judge's opinion—which has not a good word to say about the exam—or from the record before us on this appeal is *why* he thought the exam, though not job-related, was yet not arbitrary, capricious, or in a word irrational. If it were obvious why, we could uphold the district judge's decision despite his failure to explain. But it is not obvious. So if we thought that there was a constitutional right, unrelated to racial or other discrimination, to a rational test for promotion to a higher rung in the civil service of a state or municipality, we would remand the case for the judge to explain why he thought the lieutenants' test unreasonable, though not job-related in a Title VII sense. But we do not think there is such a right. We first show how we reached this conclusion as a matter of principle, and then show that the case law supports our conclusion notwithstanding the contrary precedent of *DiIulio v. Board of Fire & Police Comm'rs*, 682 F.2d 666 (7th Cir. 1982).

The due process clause of the Fourteenth Amendment forbids a state to deprive anyone of life, liberty, or property without due process of law. To make out a case under the clause one must therefore show first that one was deprived of life, liberty, or property, and second that the deprivation was brought about without due process of law. Neither element is present here.

The Supreme Court has held that the job of a tenured civil servant is property. See, e.g., *Cleveland Bd. of Educ. v. Loudermill*, 105 S. Ct. 1487, 1491-92 (1985). So if a City

of Chicago policeman, who under the law of Illinois cannot be fired without cause, see Ill. Rev. Stat. 1981, ch. 24, ¶ 10-1-81.1, is fired, this is a deprivation of property; and he has only to show that it was done without due process of law in order to prove a violation of the Fourteenth Amendment. But these sergeants did not have a property interest in the rank, which they had not yet attained, of lieutenant. It is true that state law requires promotions of government employees, including policemen, to be "on the basis of ascertained merit and seniority in service and examination." Ill. Rev. Stat. 1981, ch. 24, ¶ 10-1-13; see Chicago Municipal Code ¶¶ 25.1-3, 25.1-5 (1977). (The statutory provisions for police forces in smaller municipalities are slightly different. See Ill. Rev. Stat. 1981, ch. 24, §§ 10-2.1-6, 10-2.1-15. So far as the issues in this case are concerned, the current Chicago Municipal Code (1982) is identical to the 1977 Code in effect when these sergeants were denied promotion.) The statute and ordinance create an expectation that the examinations used for promotions in the civil service will be fair but, as the Illinois courts have held, not so firm and definite an expectation as to be "property" in a constitutional sense. See, e.g., *Sullivan v. Board of Fire & Police Comm'rs*, 103 Ill. App. 3d 167, 172, 430 N.E.2d 636, 640 (1981) (construing the provisions relating to smaller municipalities—provisions actually more protective of promotion rights than the provisions applicable to Chicago); cf. *Confederation of Police v. City of Chicago*, 547 F.2d 375, 376 (7th Cir. 1977). For it is not the examination that the applicant is interested in—no one likes taking tests—but the job. And with few lieutenants available no one can have much confidence of doing well enough on the exam to become a lieutenant, especially since the grade on the examination is only one factor that the promoting authorities take into account in deciding whether to promote; the others are seniority and any evidence of merit besides the examination grade, such as the officer's efficiency rating by his superiors. See, e.g., Chicago Municipal Code, § 25.1-5(6)(b) (1977); *Lenert v. Wilson*, 56 Ill. App. 2d 325, 206 N.E.2d 294, 297 (1965). One has no "right" to a good efficiency rating from one's superior; rating is an exer-

cise of the superior's discretion. See *Lenert v. Wilson*, *supra*, 56 Ill. App. 2d at 332-34, 206 N.E.2d at 298, cf. *Zuelke v. Board of Fire & Police Comm'rs*, 79 Ill. App. 3d 1080, 1082, 398 N.E.2d 1080, 1082 (1979). Yet without such a rating one is most unlikely to be promoted to lieutenant.

Furthermore, the promoting officials are authorized to choose among the highest-rated applicants, and no criteria are provided for the choice. See Ill. Rev. Stat. 1981, ch. 24, ¶ 10-1-13; Chicago Municipal Code ¶ 25.1-5(5) (1977). Construing the counterpart provision in the statute governing the police forces of smaller municipalities, *McCoy v. Board of Fire & Police Comm'rs*, 79 Ill. App. 3d 742, 744, 398 N.E.2d 1020, 1022 (1979), holds that "the promotion of a patrolman to sergeant is one of discretion," so that the plaintiff "had no vested right to promotion." The same is true of promotion from sergeant to lieutenant. Indeed it is more strongly true, since discretionary factors loom larger as one moves up in a hierarchy. Promotion to lieutenant's rank is not a matter of right and is not governed by fixed rules which if complied with automatically entitle the applicant to promotion. "To have a property interest . . . a person . . . must have more than a unilateral expectation of it. He must, instead, have a legitimate *claim of entitlement* to it." *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972) (emphasis added). That is missing here.

Nor do we think the intervenors were deprived of their liberty. There is indeed a concept of liberty of occupation; it goes back to the eighteenth century, see, e.g., Madison, *Essay on Property*, in 6 Madison, Writings 101 (Hunt ed. 1906 [1792]), and is the animating concept behind a number of old decisions in which the Supreme Court struck down state laws that interfered with that liberty. See, e.g., *Smith v. Texas*, 233 U.S. 630, 637-38 (1914); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). Although the Court has since abandoned the idea that the due process clause is a general charter of economic freedom, it has continued to provide limited protection for liberty of occupation. See, e.g., *Hampton v Mow Sun*

Wong, 426 U.S. 88, 102 (1976). Important examples are cases decided in the 1950s and early 1960s concerning the reasonableness of conditions on admission to the bar. See, e.g., *Schware v. Board of Bar Examiners*, 353 U.S. 232 (1957). And cases such as *Codd v. Velger*, 429 US. 624 (1977) (per curiam), which hold that firing a public worker under conditions that "stigmatize" him may invade his liberty even if he has no property right in his job, seem to rest on the idea that stigmatization may prevent him from getting another position in the same line of work. See *Lawson v. Sheriff of Tippecanoe County*, 725 F.2d 1136, 1138-39 (7th Cir. 1984); *Bone v. City of Lafayette*, No. 82-1976, slip op. at 6-8 (7th Cir. May 29, 1985); *Smith v. Board of Educ.*, 708 F.2d 258, 265 (7th Cir. 1983).

But the examination challenged in this case, while it may prevent some sergeants from becoming lieutenants in the Chicago police force, does not exclude anyone from an occupation. To be a policeman is to follow a particular calling, and to be excluded from that calling is an infringement of liberty of occupation. But a particular rank in the police force is not an occupation, just as the army is not a series of separate occupations, ranging from buck private to general of the armies, and just as the private practice of law is not composed of two occupations—partner and associate. Of course a profession may have distinct occupations; the medical profession has nurses as well as doctors. Cf. *Smith v. Texas*, *supra*, 233 U.S. at 639. But ranks within an occupation—head nurse versus rank-and-file nurse, for example—are not "occupations" themselves; and while preventing someone from advancing in his occupation can be a cruel deprivation, it would stretch the idea of liberty of occupation awfully far, it seems to us, to treat a bar to promotion as a deprivation of that liberty. Cf. *Munson v. Friske*, 754 F.2d 683, 693 (7th Cir. 1985).

But even if being denied a promotion because one had flunked an unfair examination could be a deprivation of liberty within the meaning of the due process clause of the Fourteenth Amendment, the intervenors would lose; there was no denial of due process. The usual though not

exclusive modern meaning of the term is notice of charges and an opportunity for a hearing appropriate to the nature and gravity of those charges. See, e.g., *Mathews v. Eldridge*, 424 U.S. 319, 348-49 (1976). There was no denial of due process in that sense. It is not as if the city had told the sergeants that they could not take the exam, and refused to give them a chance to be heard on why they were being barred. The sergeants are not complaining about lack of notice or lack of an opportunity for a hearing or lack of any other procedural safeguards. They complain that the poor design of the examination violates due process. This has nothing to do with administrative, judicial, arbitral, or any other procedure; it has to do with the substantive criteria for promotion.

This observation does not end the case, however. Oxymoron though it is, "substantive due process" continues to be a recognized concept of constitutional law. The best known modern instance is the right to an abortion, see *Roe v. Wade*, 410 U.S. 113 (1973), a right that rests on the due process clause of the Fourteenth Amendment but that has nothing to do with notice and hearing; but there are other examples within the general area of the family and sex. See, e.g., *Moore v. City of East Cleveland*, 431 U.S. 494 (1977). The appellants in this case have alleged the denial of another form of substantive due process. They claim a constitutional right to be tested for promotion by examinations reasonably related to the actual needs of the position for which they have applied.

We do not believe, however, that this is a valid federal constitutional claim, even if there is (as we doubt) a sense in which the appellants may be said to have been deprived of liberty by being subjected to an unfair test that they flunked. They may have a claim under state law. Cf. *Burns v. Sheriff's Dept. Merit Comm'n*, 86 Ill. App. 3d 226, 407 N.E.2d 1134 (1980); *Beard v. Board of Police Comm'rs*, 130 Ill. App. 3d 692, 474 N.E.2d 918 (1985). Nothing said in this opinion is intended to prejudge that claim. In fact they appended such a claim as a pendent to their federal constitutional claim, and we interpret the district judge's silence about their state claim as a deci-

sion to relinquish pendent jurisdiction over it, a decision that seems reasonable in the circumstances but that in any event the intervenors do not challenge in this court.

Whatever the original meaning of "due process of law," and whatever the intentions of those who drafted and ratified section 1 of the Fourteenth Amendment, the concept has been used to invalidate state action unrelated to judicial or administrative procedure or to specific rights enumerated in the Bill of Rights only when that action was deeply repulsive to the feelings of the Supreme Court Justices. In an earlier day it was action restricting economic liberty beyond the narrow bounds thought proper by the classical economists and the ideologists of laissez-faire; more recently it has been action restricting freedom of choice in intimate personal relations. A civil service examination unfair in the sense not of oppressing some racial or ethnic group for whose members the examination may be culturally inaccessible, or even just of flunking more members of one such group than of another, but of being a stupidly designed test hopelessly maladapted to the purposes for which it is being given, does not shock the conscience. To hold that it does would result in making the federal courts a super Civil Service Commission, reviewing examinations for promotions in every civil service in the United States. The federal courts do not need this additional burden. Cf. *Bishop v. Wood*, 426 U.S. 341, 349 and n. 14 (1976).

All this is not to say that the Constitution gives black police sergeants more rights than white ones, by enabling only blacks to complain in federal court about the reasonableness of the examination for police lieutenants. The law gives more rights to victims of discrimination than to nonvictims; but the victims can be white as well as black. *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 280 (1976); *Rucker v. Higher Education Aids Bd.*, 669 F.2d 1179, 1181 (7th Cir. 1982). The intervenors do not complain of racial discrimination. A federal forum may be necessary to assure the vindication of constitutional rights against racial discrimination, but for remedies against a bad exam a state forum ought to be sufficient. There is,

indeed, a conflict between the constitutional rights asserted by the plaintiffs and by the intervenors, since, as suggested in our discussion of mootness, if the intervenors won their case this might reduce the amount of relief available to the plaintiffs.

What must give us pause, though, is our decision in *DiIulio v. Board of Fire & Police Comm'rs*, 682 F.2d 666 (7th Cir. 1982), which held that white policemen in Illinois who were not alleging racial discrimination had stated a claim under the due process clause of the Fourteenth Amendment just by showing that the test for police sergeant which they had flunked did not bear a "direct and substantial" relationship to a sergeant's job. *Id.* at 669. We based this conclusion on the Supreme Court's decisions dealing with liberty of occupation, but we did not distinguish between exclusion from an entire occupation and exclusion from a particular position or rank in the occupation, nor between fair procedure and other ideas of due process.

DiIulio stands alone except for a single decision by a district court in this circuit which naturally considered itself bound by *DiIulio*. See *Ka Nam Kuan v. City of Chicago*, 563 F. Supp. 255, 257 (N.D. Ill. 1983). Occasional references in other cases to the possibility of a property interest in promotion merely assume there might be such an animal, en route to holding that the plaintiff had failed to prove a violation of the Constitution. See *Hermes v. Hein*, 742 F.2d 350, 355 (7th Cir. 1984); *Lavash v. Kountze*, 604 F.2d 103, 105-06 (1st Cir. 1979) (per curiam); *Bara v. Aurora Civil Service Comm'n*, 580 F. Supp. 212, 214-16 (N.D. Ill. 1983). Many cases are contrary to *DiIulio*. See, e.g., *Robb v. City of Philadelphia*, 733 F.2d 286, 293-94 (3d Cir. 1984) (a case factually almost identical to *DiIulio* and to the present case); *Clark v. Whiting*, 607 F.2d 634, 638, 641 (4th Cir. 1979); *Burns v. Sullivan*, 619 F.2d 99, 104-05 (1st Cir. 1980); *Doyle v. University of Alabama*, 680 F.2d 1323, 1326 (11th Cir. 1982); *Beitzell v. Jeffrey*, 643 F.2d 870, 875-79 (1st Cir. 1981); *Meyr v. Board of Educ.*, 572 F.2d 1229, 1232 (8th Cir. 1978); cf. *Levitt v. University of Texas*, No. 84-1700, slip op. at 4271-72 (5th

Cir. May 10, 1985); *Sandlin v. Johnson*, 643 F.2d 1027 (4th Cir. 1981). The most significant of the cases is *Webster v. Raymond*, 599 F.2d 793 (7th Cir. 1979), for it was a previous decision of this circuit, squarely contrary to, yet not cited in, *DiIulio*. *Webster* unanimously rejected a claim that denial of promotion to a higher rank in the civil service (in that case, promotion from teacher to principal) is a deprivation of liberty or property within the meaning of the due process clause. See 599 F.2d at 796-802. *Begg v. Moffitt*, 555 F. Supp. 1344, 1347 n. 7 (N.D. Ill. 1983), tries to reconcile the two cases on the ground that *Webster* was about "procedural" due process and *DiIulio* about "substantive" due process; but *Webster* is about substantive due process, too—the court in *Webster* said so, see 599 F.2d at 801-02. In *Altman v. Hurst*, 734 F.2d 1240, 1243 (7th Cir. 1984) (per curiam) (dictum), we cited *Webster* for the proposition "that no liberty interest is implicated where a plaintiff is denied a promotion, since he remains free to seek alternate employment if dissatisfied with his job."

Under the rules of this circuit a panel decision cannot be overruled without circulation of the overruling decision, before publication, to all the judges of the court who are in active service. See 7th Cir. Rule 16(e). That was not done in *DiIulio*; evidently the panel that decided *DiIulio* was unaware of *Webster*. This is not surprising; the briefs in *DiIulio* do not cite *Webster*, and *DiIulio* was decided without oral argument (a circumstance in which some will find an implicit message concerning the value of oral argument). Naturally the authority of *DiIulio* is less than it would be if it had considered and rejected *Webster*. We are forced to choose between *Webster* and *DiIulio*. We choose *Webster*. It accords with the great weight of authority and the recent understanding of this circuit reflected in *Altman v. Hurst*, and expresses the better view as an original matter.

The judgment of the district court dismissing the claim of the intervenors is

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 80 C 5246

WILLIAM C. BIGBY, et al.,

Plaintiffs,

and

MAURICE THOELE, et al.,

Plaintiffs-Intervenors,

v.

CITY OF CHICAGO, et al.,

Defendants.

MEMORANDUM OPINION

Prentice H. Marshall, District Judge

This is an action brought by 41 black sergeants (Bigby plaintiffs) in the Chicago Police Department challenging the Department's 1977 lieutenants' promotional examination under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e et seq. A class has been certified pursuant to Rule 23 (b)(2) of the Federal Rules of Civil Procedure in behalf of all black persons who have been adversely affected by the examination. On the eve of trial Maurice Thoele and other white and hispanic sergeants intervened as plaintiffs contending that the examination violated rights guaranteed them under the Due Process Clause of the fourteenth amendment. The defendants in the case are the City of Chicago, the Superintendent of the Chicago Police Department and the Director of Personnel of the City of Chicago.

This memorandum opinion will stand as our findings of fact and conclusions of law pursuant to Rule 52(a) of the Federal Rules of Civil Procedure.

This is a disparate impact case. The basic premises are well established. *See, e.g., Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975); *Connecticut v. Teal*, 102 S [sic].

As the Court said in *Teal*:

> To establish a prima facie case of discrimination, a plaintiff must first show that the facially neutral employment practice had a significantly discriminatory impact. If that showing is made, the employer must then demonstrate that 'any given requirement [has] a manifest relationship to the employment in question,' in order to avoid a finding of discrimination. 102 S. Ct. at 2531.

For the reasons hereinafter stated, we hold that plaintiffs proved a prima facie case and that defendants failed in their burden.

On January 5, 1976, we entered a prohibitory injunction in *United States v. City of Chicago*, 411 F. Sup. 218 (N.D. Ill. 1976), *aff'd* 549 F. 2d 415 (7th Cir. 1977) dealing with the employment of patrol officers and the promotion of sergeants by the Chicago Police Department. Five months later defendants began preparation of an examination for the promotion of lieutenants.

The lieutenants' test was completed in 1977. It is comprised of three parts: a written examination, an oral interview, and the average of the applicant's last four performance ratings as a sergeant. The scores of the three segments were combined in a 40-30-30 ratio to produce a composite final score. Applicants were placed on the final eligibility list in rank order of their composite scores.

The examination was taken by 1,062 persons, 835 (78.63%) were white, 188 (17.7%) were black, 38 (3.58%) were hispanic and one was asian. Composite scores on the eligibility list range from a top of 95.91 to 70.

The top 108 persons on the list have been promoted in rank order. Ninety-three (86.11%) are white, eleven (10.19%) are black and four (3.7%) are hispanic. The overall rate of promotions for black applicants is 52% of the rate of promotions for white applicants. If, as defendants have urged, the top 271 were promoted, the black to white promotion rate would be 66% and if 291 were promoted, the rate would be 65.5%. These rates demonstrate a disparate impact under the "80% rule" of the Uniform Guidelines on Employee Selection Procedures. 29 C.F.R. §1607.4D (1981). *Connecticut v. Teal*, 102 S. Ct. 2525, 2529 n. 4 (1982); *United States v. City of Chicago*, 663 F. 2d 1354, 1357 n. 8 (7th Cir. 1981). Indeed, the disparate impact under the 80% rule persists as low as 355 on the eligibility list. When one realizes that the Department has never promoted more than 245 lieutenants from a particular roster, the depth of the disparate impact is determinative. Furthermore, the evidence shows that each component of the examination had a disparate impact upon black applicants whose scores were high enough to have a practical chance of being promoted.

A disproportionate number of white applicants received scores of 71 and above on the written test: 23 blacks and 150 whites received such a score. The "success rate" for blacks on the written test was 12.23%. That is 68% of the "success rate" for whites which was 17.69%.

The scores from the oral interviews likewise had a disparate impact under the 80% rule for scores of 88 and above. Fifth-eight blacks and 301 whites received scores of 88 and above, the "success rate" for blacks (10.22%) is 78% of the "success rate" for whites (13.12%).

Documents provided by the defendants established that four of the raters at the oral boards gave consistently lower scores to blacks than to whites. Defendants' expert, Alvares, recognized this disparity. Plaintiffs' evidentiary analysis demonstrated that the disparate impact or the oral scores was attributable to the four low raters.

The written and oral scores were combined to produce 70 points of the maximum final score of 100. The combined written and oral scores had a disparate impact under the 80% rule rule for scores of 58 and above; 47 blacks and 261 whites received composite scores of 58 and above. The "success rate" for blacks (25.27%) is 78% of the "success rate" for whites (32.30%).

The performance ratings showed a disparate impact under the 80% rule for scores of 88 and above. Eighty-six blacks and 476 whites received scores of 88 and above. The "success rate" for blacks (46.24%) is 78.5% of the "success rate" for whites (58.91%).

The final cumulative scores have a disparate impact under the 80% rule for scores of 84 and above. Fifty-three blacks and 302 whites received such scores. The "success rate" for blacks (28.49%) is 76% of the "success rate" for whites (37.38%). Defendants' suggestion that the disparity is reduced as one progresses down the roster to the 271st and 291st position has been previously noted as erroneous for there the black-white success ratio is 66% and 65.5%.

Defendant urges that disparities in the high 60 and 70 percentiles should not be regarded by the court as establishing a prima facie case of discrimination under *Griggs*, *Albemarle* and *Teal*. Their position loses sight of the fact that the Supreme Court in *Teal* and the court of appeals for this circuit in *United States v. City of Chicago*, 663 F. 2d 1354, 1357 n. 8 have approved the Uniform 80% guideline. Furthermore, a 4/5 disparity, which is what the 80% rule tolerates, is itself a significant disparate impact. The line is a generous one which should not be watered down by lax judicial application.

Defendants argue that a conclusion that plaintiffs have proved a prima facie case on the basis of the foregoing statistics is contrary to our conclusion in *United States v. City of Chicago*, 411 F. Supp. 218, 239 (1976) that the 1970 lieutenants' examination and performance ratings were not impermissibly discriminatory. At the time of our 1976 decision, the Uniform 80% rule had not been promul-

gated and, accordingly, it had not been approved by the Supreme Court and the court of appeals. Furthermore, the proof here is of greater precision and persuasion that was presented with respect to the 1970 examination. We hold that plaintiffs have proved a prima facie case in the present proceeding.

Indeed, defendants recognized as much when, more than a year prior to trial, they did not deny plaintiffs' Rule 36 request that "examination number 7081 [the lieutenants' examination] . . . had a disparate impact upon black applicants." By their failure to deny that request, defendants admitted it. That was a judicial admission by the defendants that the examination had a disparate impact upon black applicants. We question their ability to contradict it now. *Rainbolt v. Johnson*, 669 F. 2d 767, 768 (D.C. Cir. 1981). "A judicial admission, deliberately drafted by counsel for the express purpose of limiting the facts and issues, is traditionally regarded as conclusive, and an admission under Rule 36 falls into this category." 8 C. Wright & A. Miller, Federal Practice and Procedure, §2264, p. 743 (footnote omitted). "Any evidence inconsistent with the stipulated admissions cannot be considered by the court." *Shakman v. Democratic Organization of Cook County*, 481 F. Supp. 1315, 1346 n. 35 (N.D. Ill. 1979).

Apart from the Rule 36 admission, however, plaintiffs have established a prima facie case placing upon defendants the burden of demonstrating that "any given requirement [has] a manifest relationship to the employment in question." *Griggs*, 401 U.S. at 432. The test must be "predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated." *Albemarle*, 422 U.S. at 431. At trial, defendants sought to meet this burden with proof of content validity.

When a claim of content validity is made, the employer must show that the tasks on the examination substantially

represent equivalent tasks on the job. *United States v. City of Chicago*, 549 F. 2d 415, 434 (7th Cir. 1977). Such a showing must be preceded by a thorough task analysis of the job to be performed. *United States v. City of Chicago*, 573 F. 2d 416, 425 (7th Cir. 1978) (Fire Department litigation). The evidence shows substantial flaws in defendants' "task analysis". In addition, the examination fails to measure relevant job functions.

According to defendants' evidence, the job analysis included 30 to 40 interviews with field lieutenants, during which a questionnaire was completed. Thereafter another questionnaire was administered to 20 lieutenants. Those given the first questionnaire were limited to field lieutenants even though lieutenants are engaged in staff and non-field work. Furthermore, the persons who filled out the questionnaire were the "best men" available, resulting in a non-representative sample.

The second defect in the job analysis was defendants' failure to retain any source data. "It is essential that the sample design, the questionnaires and the manner of interviewing meet the standards of objective surveying and statistical techniques." *Pittsburgh Press Club v. United States*, 579 F. 2d 751, 758 (3d Cir. 1978). Incredibly, defendants in the throes of the 1976 employment/promotion litigation, did not retain any of the completed questionnaires and did not even have a copy of the questionnaire that was actually administered. Nor did defendants maintain records showing the identity of the persons who filled out the questionnaire. Thus, there is no beginning "record of validation" *United States v. City of Chicago*, 549 F. 2d 415, 432 (7th Cir. 1977).

After the job analysis had been completed, defendants' next step was to determine how the dimensions of the job of lieutenant should be measured. Initially, they planned a written test of job knowledge as a screening device to be followed by an "assessment center".

The assessment center approach was abandoned as too expensive, although no estimate of the costs involved in

using that technique was ever prepared. Defendants' outside expert, Alvares, had concluded that all dimensions of the job could not be measured by a written test. Therefore, oral interviews were used in an attempt to measure dimensions which were not covered in the written exam. Alvares conceded, however, that there is no data which shows that the oral scores actually measured these dimensions or indeed measured anything other than "halo."

The final component of the exam—performance ratings—was used without any data to show that the ratings measured actual performance. Defendants were explicitly warned by Alvares that "the justification for the performance evaluation is weak." (Plaintiffs' exhibit 15). He also advised against using any performance rating given after the announcement of the exam, but that advice was ignored.

The written test consists of 84 multiple choice questions. Information from department "general orders" was used as the source of the questions. The evidence is in total disarray as to how and by whom the general orders were selected. A panel of high ranking "experts" was recruited, but they were not provided with copies of the orders. They were given a check list keyed to the general orders. But the checklists could not be found and they have never been produced. Thus the basic source of the written examination is a mystery.

Equally unanswered is the question, Who wrote the actual test? According to Alvares, all of the questions used on the written exam were written by non-police graduate students at Bowling Green University where Alvares is a professor. According to defendants' witness Joyce, some of the questions were prepared by staff members of the Department of Personnel. Yet another version was offered by Deputy Chief of Patrol Charles Pepp who testified that he along with other high ranking officials prepared questions for the written test.

It is equally unclear who reviewed the multiple choice questions before they were incorporated in the written

examinations. When Joyce was deposed in 1981, he identified Sam Nolan, Fred Rice, Thomas Lyons, James Riordan, and Patrick Needham, as the high ranking police officers who reviewed the written test questions. But Nolan, Rice and Lyons each denied having reviewed the written exam. At trial, Joyce explained the contradiction by his "faulty" memory. He then stated that Nolan (contrary to Nolan's testimony), Needham, Spiotto and Killackey were the reviewers.

Documentary evidence produced by defendants indicates that 122 questions were prepared at Bowling Green and reviewed by Needham, and Spiotto. Their efforts were, according to Joyce, incorporated into a loose-leaf notebook which was marked defendants' exhibit 5. When Needham testified, he stated that he was not familiar with the notebook.

The effectiveness of the screeing process by Needham and Spiotto was dubious. Of the 84 questions used on the exam, Needham and Spiotto were unable to answer correctly 17. In his deposition (admissible as the admission of defendant City), Needham described some of the questions as "silly stuff" and stated that "most of these questions I would have pitched if I had seen them." The test was "not what we would have liked by any stretch of the imagination."

In preparation for trial, *plaintiffs* asked Needham and four other high ranking police officials to review the 84 test questions actually used. They could agree that only 11 of the 84 questions were very important for a lieutenant to know. Thus, as in *Firefighters' Institute v. City of St. Louis*, 616 F. 2d 350 (8th Cir. 1980), it appears that "the examination measured items of knowledge that were not necessary for successful performance of [the] job."

An important part of test validation is the "retranslation" of test items to job dimensions. Alvares and Joyce undertook this task. Their differences are so extreme as to border on the ludicrous. Alvares found 42 questions related to dimension number 11 while Joyce found none;

Joyce found 39 items related to dimension number 3 and Alvares found 19. The only inference that can be drawn from the retranslation is that guess and conjecture were the only links between the items and the dimensions to be tested.

The evidence presented at trial demonstrates that higher scores do not necessarily demonstrate greater knowledge of significant policies and procedures of the Department. Virtually the entire difference in individual final scores on the written test is attributable to only 48 of the 84 questions. They are "significantly correlated" with the final score. The disparate impact of the written test arises solely from the "significant" questions. Accordingly, defendants must establish that the validity of the test is enhanced by these questions. The evidence was to the contrary.

As previously noted, plaintiffs requested Needham and four other high ranking police officers to review the questions on the exam. These experts concluded that at least 24 of the 48 significant questions failed to measure important aspects of the job of lieutenant in a reliable manner.

In his review of the results of the lieutenants' examination—a review which he undertook while employed by the City in its Department of Personnel—Joseph Schreiner concluded that the written score "may not truly represent any meaningful construct." The evidence presented at trial is in accord with Shreiner's finding: there is no basis to conclude that the scores on the written test had "a manifest relationship to the employment in question." *Griggs*, 401 U.S. at 432.

The oral interviews were used in an attempt to measure dimensions of the lieutenants job which were not translated in the written test. Defendants' expert Alvares conceded, however, that there is no data to show that the dimensions were actually measured by the oral interviews.

Furthermore, the performance of the raters was doubtful. As stated in one of defendants' internal reports (plaintiffs' exhibit 60):

> The quality of the rater's judgment is suspect because individual raters have extremely consistent and reliable assessments of a candidate's ability, but the assessment between raters agree poorly. It would require nine raters to attain internal consistency reliability of .90, given this poor agreement. Though there were ten separate scales on the orals, they effectively measure only one global ability assessment.

The raters were instructed to ask verbatim the questions which had been written at Bowling Green. As Alvares testified, the more unstructured an interview, the less valid its results. A training session was held to insure that the raters followed these instructions. But not all of the raters attended the training session. In addition, the evidence shows that the instructions were not followed by all of the raters. The evidence is that the interviews concerned matters other than the questions and were shorter than the time allotted in the instructions.

Once again, crucial documents relating to the oral boards were not retained by defendants. Over Alvares' objection, background information about applicants was provided to the raters at each oral interview. Alvares never saw the form used to provide this information and defendants failed to produce any of the forms during discovery or trial. Although raters were not to have known the results on the written examination, one candidate testified that his written scores were discussed by the panel at his oral interview.

Finally, as previously noted, documents which were provided by the defendants demonstrated that four of the raters at the oral boards gave consistently lower scores to blacks than whites. Plaintiffs have demonstrated that the disparate impact of the oral scores was attributable to these four raters.

In his October 12, 1978 memorandum (plaintiffs' exhibit 15), Alvares suggested that the race differences on the oral scores "best . . . remain undiscussed." Defendants failed to adjust for the race differences. Their failure destroys any claim of validity for the oral scores.

In the earlier litigation concerning the promotion of sergeants, we expressed some concern about performance ratings in promotional decisions. Initially, we enjoined their use. In the final decision, we vacated that injunction. In that litigation, we concluded, in the absence of the Uniform 80% rule, that the performance ratings used for the promotion of sergeants were not discriminatory. Here we have concluded, using the 80% rule, that plaintiffs have established a prima facie case that the performance ratings do have a discriminatory disparate impact upon black lieutenant applicants. That being the case, the burden rests upon defendants to validate the performance ratings. They have failed to do so.

Defendants' consultant Alvares pointed out that "the justification for the performance evaluation is weak." (Plaintiffs' exhibit 15.) He also testified that there is no data to show that the performance ratings actually measure performance.

The evidence shows that the fourth rating was given following the announcement of the lieutenants' promotion exam so that the rater knew the potential effect of the rating.

The ratings are subject to forced averaging at 85 (on a scale of 100). Performance ratings are frequently decided upon at a staff meeting. A global assessment is given to a sergeant and subscale ratings are then calculated to average the final rating.

However, certain high cluster units are exempt from the forced average. Here all can receive excellent marks. Former Superintendent Brzeczek conceded that performance ratings are influenced by job assignments.

In most units, the average performance score is 87.8, but in the high cluster units, the average score is over 92.4. The higher scores in the high cluster units have a great impact upon the final rank on the lieutenants' test. The 4.6 point increase in performance ratings would be reflected in a 1.38 point increase in the final score which would move a person from 108 to number 57 on the list.

Blacks in high cluster units are not rated in the same way as are whites. Although 36 of the highest scoring 150 sergeants came from the high cluster units, only one of these 36 is a black. High cluster assignments are not posted; they are learned about and applied for by word of mouth.

Defendants have failed to establish that the performance rating system is related to performance as a sergeant.

The relative weight given to each of the segments of a multi-segment exam such as this, is of great importance in assessing a claim of content validity. The draft of defendants' final validation study acknowledges that the relative weights were "arbitrarily assigned." (Plaintiffs' exhibit 16 at 5.) The evidence at trial showed that the 40-30-30 weight is without emperical basis and is "only so much window dressing." (Plaintiffs' exhibit 60 at 2.)

As explained by Joseph Schreiner in a memorandum he authored while employed by the City in its Department of Personnel:

> . . . the relative ratios between the standard deviations of the 3 test components is indicative of the relative importance of the 3 components to the total score. The average component score has *no* effect on the final ranking; only the component standard deviation does. The multiplier weight has no effect on the true importance of a component to the total score, except to the extent it modifies the component's standard deviation. Thus, the .4 - .3 - .3 weighting is only so much window dressing, for it is not indicative of the true importance of each of the components to the final score.
>
> * * *
>
> All other things being equal, it will be best for a candidate's final score if he did well on the written, rather than the orals, or the efficiencies, for the scoring procedure allows this higher standing to be translated into more points. In terms of influencing the final score, the relative importance of the three is

not 4-3-3. It is 6-3-2. (emphasis in original) (Plaintiffs' exhibit 60 at 2-3.)

More than three-quarters of the variance in final scores is attributed to the written score alone. Forty-eight of the 84 questions on the written exam explain 95% of the variance in written scores. Half of those 48 questions were poorly written or not job related by the five departmental experts recruited by plaintiffs. There can be little doubt of the lack of job relatedness in the final score. It was for this reason that Alvares recommended "that the less said [about how the scores are combined at the end of the process] the better." (Plaintiffs' exhibit 15).

Defendant's expert Alvares acknowledged that there was a lack of any emperical basis for the combination of scores. This coupled with the extreme influence which the written scores had on final rankings demonstrates that the combination of three scores on tests which were not job related did not produce a job related final score.

The final list of eligibles shows that 41 applicants (ranging in final rank from 89 to 130) received scores between 88 and 89. Rank order promotion could result in an applicant with a score of 88.53 being selected over an applicant with a score of 88.49. This difference in scores in infinitesimal. It is less than one question on the written test. It could be the result of a lucky guess or a one point difference in a single performance rating. As the defendant Pounian conceded, there is no way to tell that a person with a score of 88.53 would be a better lieutenant than one with a score of 88.49.

But the vice here is not so superficial as 108 vs. 109. Defendants concede that they could not justify a decision based upon such miniscule differences in final scores. But they are also unable to justify the promotion of the top 108 of the list over the next 108. As their consultant Alvares testified, there is no data to show that the first 108 on the list will be better lieutenants than the next 108. Nor, of course, is there any data from which one could say whether number 216 would be better or not as good as number 1.

The Uniform Guidelines require that an employer show "that a higher score . . . is likely to result in better job performance" in order for scores to be used in rank order. Uniform Guidelines, §14(C)(9). We have previously adopted this standard when we held that in order to establish validity the defendants must demonstrate that scores are "a valid predictor of performance on the job." *United States v. City of Chicago*, 385 F. Supp. 543, 559 (N.D. Ill. 1974). Such evidence is lacking here.

Rank ordering satisfies a felt need for objectivity, but it does not necessarily select better job performers. In some circumstances, the virtues of objectivity may justify the inherent artificiality of the substantively deficient distinctions being made. But when test scores have a disparate racial impact, an employer violates Title VII if he uses them in ways that lack significant relationship to job performances. *Guardians Association of New York City v. Civil Service Commission*, 630 F. 2d 79, 100 (2nd Cir. 1980).

Emperical evidence is necessary to validate rank order selection from a test which has a disparate racial impact. *Firefighters Institute v. City of St. Louis*, 616 F. 2d 350, 358 (8th Cir. 1980). The complete absence of any evidence to justify rank order promotion requires that the practice be disapproved.

Although we have found defendants' 1977 lieutenants examination invalid under Title VII, it does not follow that it was arbitrary and capricious so as to entitle the intervenors, Maurice Thoele, et al. to recover under the Due Process Clause of the fourteenth amendment. While they may be the beneficiaries of the Bigby plaintiffs' victory, they are not entitled to any relief in their own right.

All members of the Bigby class have been denied equal employment opportunities contrary to Title VII of the Civil Rights Act of 1964, as amended. The basic remedy for this discrimination is an equalization of promotions. There is presently pending a motion by defendants to promote 40 persons to the rank of lieutenant from the 1970

list. The first 11 should be members of the Bigby class in their rank order on the eligibility roster. Thereafter, the promotions should be made in accordance with the ratios of the applicant pool: 78.63% white, 17.7% black, and 3.58% hispanic.

The immediate promotion of 11 class members is necessary to undo the disparate impact of promotions already made. Only 11 of the 108 persons promoted—10.18%—have been black. The immediate promotions of 11 class members will bring the black proportion to 18.18% which is in line with the 17.7% black composition of the applicant pool.

Another important element of the remedy provided by Title VII is back pay. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975). Because it is impossible to determine which class members would have been promoted if defendants that employed a job related test, class back pay is appropriate. *Stewart v. General Motors*, 542 F. 2d 445, 452 (7th Cir. 1977). The amount of back pay to be distributed to the class is based upon the loss to the class as a result of the discriminatory selection process. *Hameed v. International Association*, 637 F. 2d 506, 520 (8th Cir. 1980). Plaintiff urges that each class member should receive an aliquot share of the class back pay pool.

Defendants, concentrating on liability, have not responded to plaintiffs' proposed back pay formula. They should promptly do so in order that the back pay may be embraced in the final decree, which we direct plaintiffs to present.

One additional remedy is called for in light of the record in this case: monitoring. The facts surrounding the preparation, documentation and analysis of the lieutenants' examination make plain that careful monitoring of future test development is essential. The need for monitoring is made evident by the circumstances surrounding the defendants' production and failure to produce crucial documents during the course of discovery and trial.

Defendants' witness Joyce testified that he had located a set of general orders which had been used in the preparation of the exam, and that he had delivered the documents to defendants' counsel. The documents were not produced prior to trial nor were they referred to in defendants' response to plaintiff's rule 34 request. Following Joyce's testimony, we directed an inquiry to counsel who responded that, "everything that I had I turned over, as far as I know, and I do not have any such set of general orders in my file." (Tr. 500.) We then made plain that a set of general orders were crucial to defendants' case. Magically, the general orders were produced the following day! Later, Joyce testified that the documents had just been discovered "sometime last week." (Tr. 1158.)

Defendants' failure timely to produce documents is compounded by their policy of non-retention of crucial documents: the forms rating the importance of general orders, questionnaires used in the job analysis, rosters of who participated in the surveys, the summary of background information used at oral interviews, and finally, the Alvares memo in which he expressed his doubts about the validity of the examination. (Plaintiff's exhibit 15.) Although addressed to defendant Pounian and then his colleagues Joan Cole and Joyce, none could recall receiving it. The contents of the memo were noteworthy. Alvares called defendants' attention to the lack of support for the use of performance ratings, the problems involved in the arbitrary combination of the written, oral and performance scores, and the existence of raters who favored whites over minorities. Prior experiences in this litigation leave us with nagging doubts as to the professed ignorance of the memo.

Certain it is that the Alvares memorandum was revised to "cover everything in as positive a light as possible." (Plaintiffs' exhibit 15.) Thus, the language in the draft—that the adequacy of content validation "is still a matter of emperical speculation" was removed from the final report. In addition, Alvares' characterization of the 40-30-30 weights as "arbitrary" was excised because it was "too

strong." (Tr. 150.) Also omitted was Alvares' statement that "it was impossible to distinguish between the relative importance" or the orals and performance ratings. Defendant Pounian claimed not to know why this phrase was crossed out. (*Id.* 155). Finally, while the draft recognized the "artificial 'game-playing' that frequently happens when individuals try to raise their evaluations immediately prior to the exam," (Plaintiffs' exhibit 15 at 8), this criticism is nowhere contained in the final report.

It was the revised final report which defendants produced for plaintiffs' inspection. The original draft would never have come to light had it not been that Alvares was called upon to produce documents by way of subpoena.

Somewhat akin to the "non-retention policy" is defendants' failure to documents important activities in the preparation of the examination. Much of the work supposedly done in preparing the test can only be reconstructed from the testimony of a witness who acknowledged that his memory is "faulty." (Tr. 1151.) The identity of many of those who participated in the preparation of the exam is a total mystery and there is conflict among the testimony of high ranking officers with regard to their participation. We are utterly at a loss to comprehend how defendants, having been found to have violated Title VII just five months before they commenced the preparation of this examination, could be so neglectful in their record-keeping with respect to this examination.

Finally, the evidence shows that defendants have nade little or no use of their sophisticated computer capacity. Important analyses that could have been performed were not performed. And those that were undertaken were either ignored or undertaken solely to defend this case. No adequate computer analysis was made of the performance ratings. Nor was any evaluation of the disparate impact of each component of the examination undertaken. Defendants virtually ignored the complex analysis undertaken by Alvares of the oral scores in his findings that some raters gave significantly lower scores to blacks.

The evidence in the case requires monitoring to ensure "that a fair test can be created without substantial further delay." *Castro v. Beecher*, 459 F. 2d 715, 738 (1st Cir. 1972). We reserve at this time articulating the precise dimensions of the monitoring relief. One form worthy of consideration by the parties is that invoked in *Firefighters Institute v. City of St. Louis*, 616 F. 2d 350, 368 (8th Cir. 1980). The parties must work together to develop a valid examination. Defendants should disclose to plaintiffs' counsel and experts, under an appropriate protective order, all steps involved in the test development. Plaintiffs' counsel and their experts should be invited to all planning meetings, and should receive copies of all reports and memoranda generated in the preparation of the examination. Plaintiffs' counsel should be permitted to advance constructive criticisms. To ensure that defendants do not again embark on a course calculated to be indefensible under Title VII, we should retain jurisdiction over future test developments.

Defendants' pending petition to modify the injunction prohibiting promotions to the rank of lieutenant of police and for permission to promote 40 sergeants to the rank of lieutenant in rank order from the existing roster is denied. Plaintiffs' counsel is directed to present a decree in conformity with the views expressed herein with notice to defendants.

ENTER:

/s/ Prentice H. Marshall
District Judge

DATED: April 18, 1984.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Name of Presiding Judge,
Honorable PRENTICE H. MARSHALL

Cause No. 80 C 5246 Date April 18, 1984

Title of Cause WILLIAM C. BIGBY, et al. and MAURICE THOELE, et al. v. CITY OF CHICAGO, et al.

ORDER

Defendants' pending petition to modify the injunction prohibiting promotions to the rank of lieutenant of police and for permission to promote 40 sergeants to the rank of lieutenant in rank order from the existing roster is denied. Plaintiffs' counsel is directed to present a decree in conformity with the views expressed in the attached opinion with notice to defendants. (DRAFT)

/s/ PRENTICE H. MARSHALL

Domenic DiIULIO, et al.,
Plaintiffs-Appellants,

v.

BOARD OF FIRE AND POLICE COMMISSIONERS OF the CITY OF NORTHLAKE, et al., Defendants-Appellees.

No. 80-1966.

United States Court of Appeals,
Seventh Circuit.

Submitted April 6, 1982

Decided June 30, 1982.

Before CUMMINGS, Chief Judge, PELL, Circuit Judge, and CUDAHY, Circuit Judge.

PELL, Circuit Judge.

At issue in this case is the constitutional validity of an examination required for the promotion of appellants, police patrolmen, to the position of police sergeant.[1]

I

In our appraisal of appellants' claims we must accept their version of the facts properly before the district court because that court granted summary judgment against them.[2] *Bishop v. Wood*, 426 U.S. 341, 345, 347, 96 S.Ct. 2074, 2077, 2078, 48 L.Ed.2d 684 (1976).

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[1] The action was brought pursuant to 42 U.S.C. § 1983 and the due process and equal protection clauses of the Fourteenth Amendment of the United States Constitution. Damages, as well as declaratory and injunctive relief, are being sought.

[2] In granting summary judgment for appellees the district court was required to resolve all genuine disputes as to material facts in favor of appellants. *Fed.R.Civ.P.* 56(c).

Appellants were hired prior to December 10, 1977, as police patrolmen by the Board of Fire and Police Commissioners of the City of Northlake, Illinois. Promotion within the Northlake Police Department is governed by state law and the Rules and Regulations of the Board of Fire and Police Commissioners of the City of Northlake (the Board), *Ill.Rev.Stat.* ch. 24, § 10-2.1-1 *et seq.*, pursuant to which, promotions are based upon merit, seniority, and competitive examinations. In all cases where it is practicable, vacancies are to be filled by promotion. A promotion roster must be prepared based on the competitive examinations, ascertained merit, and seniority. Vacancies must be filled by one of the three candidates at the top of the roster, and a high ranking candicate cannot be passed over more than twice.

"[I]n determining next in order of rank in promotional examinations, . . . [the Board] extend[s] the examination successively through all the orders of rank in the services in an endeavor to qualify suitable eligible or eligibles for the vacancy or vacancies existing before extending the examination to the general public." And "[n]o examination shall be given if a vacancy exists at that time and an eligibility list is in existence." The names of candidates on the promotional roster may be removed by the Board after two years only if all existing vacancies are filled prior to cancellation. *Ill.Rev.Stat.* ch. 24, § 10-1-13.

The competitive written promotional exam accounts for 55% of the total score in the promotional scheme.[3] A score of 70 is required to pass the written exam. It is statutorily provided that the examination shall be conducted by the Board and that the "examinations shall be practical in character and relate to the matters which will fairly test the capacity of the persons examined to discharge the duties of the positions to which they seek [promotion]." *Ill.Rev.Stat.* ch. 24, 10-2.1-6.

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[3] The other factors in the promotional scheme are ascertained merit and seniority in service.

On December 10, 1977, the Board held a promotional examination for the rank of sergeant.[4] The plaintiffs, seeking promotion to the rank, unsuccessfully participated in said examination.[5]

Appellants' cause of action is based on their claim that the promotional examination was "arbitrary, capricious, and discriminatory and lacked and was devoid and not in furtherance of any substantial, rational, reasonable an [sic] or compelling, relationship to any legitimate promotional scheme for the rank of sergeant, purpose or objective, in violation and derogation of due process of law and the equal protection of the laws guaranteed under the Fourteenth Amendment . . . because it was not validated nor job related."[6] This case is not moot as we cannot state with assurance that there is no reasonable expectation that the alleged violation will recur, nor have interim relief or events completely and irrevocably eradicated the effects of the alleged violation. *County of L. A. v. Davis*, 440 U.S. 625, 631, 99 S.Ct. 1379, 1383, 59 L.Ed.2d 642 (1979).

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[4] The Board stated that since 1970 it has used independent testing agencies to develop and conduct the written promotion examinations.

[5] Three plaintiffs did not achieve the minimum score necessary for placement on the promotion roster. Our plaintiff passed the examination and was ranked seventh on the promotion roster.

[6] Appellants cite specific questions contained in the promotional exam which they argue are representative of the examination's alleged lack of job relatedness or validity: "a. Would you drink blood if you had to? b. Do you believe God has talked to you personally? c. When you wake up in the morning, is your heart beating? . . . The above questions represent approximately 450 similar questions that had to be answered either as never, most never, probably not, probably, most probably, more likely . . . none of the questions related to police work . . . . [Some of the other cited questions def[y] a correct answer without requiring the examinee to explain his answer. . . . [Other cited] questions required a self-evaluation by the examinee which evaluation was self-opinionated and would have no bearing on his performance as a police officer. . . . [And] the last section of the written examination was not validated or job related in that it required knowledge of crimes that police officers do not ordinarily encounter [examples cited]."

II

To satisfy the prerequisite for an assertion of the constitutional requirements of due process, a party must implicate a protected interest in either life, liberty, or property. *Board of Regents v. Roth*, 408 U.S. 564, 569, 570, 571, 92 S.Ct. 2701, 2705, 2706, 33 L.Ed.2d 548 (1972). The district court disposed of appellants' due process claim by concluding that since state law does not grant appellants "a proprietary interest in a validated or otherwise certified job-related promotional examination, it is clear that no constitutionally protected interests are involved in the present matter." We believe that the district court's sole focus on a property interest without regard to a liberty interest was in error. Appellants' promotion was not a matter subject to the Board's grace, nor was it a matter left to the unfettered discretion of the Board. *Compare, Board of Regents v. Roth*, 408 U.S. at 567, 92 S.Ct. at 2704. As we explained in Part I, the promotion scheme was based on evaluation of merit, seniority, and competitive examination. While the state can require high standards of qualifications, these standards must have a rational connection with the applicant's fitness or capacity to be a police sergeant. *Schware v. Board of Bar Examiners*, 353 U.S. 232, 77 S.Ct. 752, 1 L.Ed.2d 796 (1957). Attaching unreasonable and arbitrary requirements is violative of constitutional due process. *Smith v. Texas*, 233 U.S. 630, 639, 34 S.Ct. 681, 683, 58 L.Ed. 1129 (1914); *Smith v. Alabama*, 124 U.S. 465, 480, 8 S.Ct. 564, 570, 31 L.Ed. 508 (1888); *State v. Walker*, 48 Wash. 8, 92 P. 775 (1907).[7] In the instant case, at issue is not the state's right to require an examination, but the rational relation between the particular questions formulating the exami-

[7] Of course the Fourteenth Amendment applies only to government actions. It is conceded here that appellees have acted pursuant to authority conferred by state law. *See* Part I, *supra*. The limitation against arbitrary action restricts the power of a state "no matter by what organ it acts." *Missouri v. Dockery*, 191 U.S. 165, 24 S.Ct. 53, 48 L.Ed. 133 (1903).

nation and the functions of the job of police sergeant. We hold that appellants have sufficiently implicated a liberty interest in promotion which cannot be denied without constitutional due process.[8]

While the state may test a person for the job, it may not test a person in the abstract. Constitutional due process guarantees that no person will be arbitrarily deprived by the government of his liberty to engage in any occupation. "[T]he liberty guaranteed by the Fourteenth Amendment . . . without doubt . . . denotes not merely freedom from bodily restraint but also the right of the individual . . . to engage in any of the common occupations of life . . . ." *Meyer v. Nebraska*, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923), *cited* in *Board of Regents v. Roth*, 408 U.S. at 572, 92 S.Ct. at 2706; *Hampton v. Mow Sun Wong*, 426 U.S. 88, 102, 96 S.Ct. 1895, 1904, 48 L.Ed.2d 495 (1976); *Traux v. Raich*, 239 U.S. 33, 41, 36 S.Ct. 7, 10, 60 L.Ed. 131 (1915). In *Graves v. Minnesota*, 272 U.S. 425, 47 S.Ct. 122, 71 L.Ed. 331 (1926), the Supreme Court upheld the constitutionality of a state statute prohibiting the practice of denistry without a diploma from a dental college of good standing, as against the contention that the requirement violated constitutional due process. The Court did not uphold the requirement of a diploma *per se*, but rather the rationale for requiring a particular type of diploma in that case. As the Court stated, "clearly the fact that an applicant for a license holds a diploma from a reputable dental college has a *direct and substantial relation to his qualification to practice dentistry.*" *Id.* at 428, 47 S.Ct. at 123 (emphasis added).

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[8] "If [a state] purported to confer arbitrary discretion to withhold a license, or to impose conditions which have no relation to the applicant's qualifications to practice [a profession], the statute would, of course, violate the due process clause of the Fourteenth Amendment." *Douglas v. Noble*, 261 U.S. 165 at 168, 43 S.Ct. 303 at 304, 67 L.Ed. 590.

Similarly, at issue in the instant case is whether the particular promotion examination has a direct and substantial relation to appellants' qualifications to be police sergeants.[9] In *Konigsberg v. State Bar of California*, 366 U.S. 36, 81, S.Ct. 997, 6 L.Ed.2d 105 (1961), (*Konigsberg II*) the Supreme Court upheld the state's refusal to license an applicant to the bar because of his refusal to answer questions. Again *Konigsberg II* did not sanction the asking of any questions regardless of their rational relation to the functions of the profession. What was critical in *Konigsberg II* was that the particular questions at issue were found to be substantially relevant to the applicant's qualification and thus in accordance with due process guarantees. Appellants' assertion in the instant case is analogous to the assertion of an applicant for admission to the State Bar whose prior membership in the Communist party and his use of aliases were not rationally related to the qualifications required for membership in the legal profession as to serve as a rational basis for the state to deny him permission to take the bar exam. *Schware v. Board of Bar Examiners, supra.* In *Schware* the Supreme Court held that plaintiff had sufficiently asserted a liberty interest to employment guaranteed by the due process clause.[10]

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[9] "[I]t does a man little good to stay alive and free and propertied, if he cannot work [in his chosen occupation]. The distinction between the state's power to license doctors and to license street vendors is one of degree. The fact that a doctor needs a good knowledge of biology is no excuse for suspending his license because he has little or no knowledge of constitutional law." *Barsky v. Board of Regents*, 347 U.S. 442, 473-74, 74 S.Ct. 650, 666-67, 98 L.Ed. 829 (1954) (Douglas, J. *dissenting*).

[10] Appellants' claim is not precluded by the fact that they cannot be certain that they would have achieved a sufficient score so that they would have been promoted had they been given a job-related examination. in *Schware*, the plaintiff could not be certain that he would have in fact passed the bar examination; nevertheless he was allowed to challenge, on due process grounds, the state's denial to him, based on a finding of unfitness to practice law, of permission to take the examination.

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III

Normally in a case such as this, where only constitutional due process interests are sufficiently asserted, a plaintiff has the burden of moving forward and the ultimate burden of proving that the state-established requirements for the employment he sought are not rationally related to the functions of the job.[11] The state is not

[10] *continued*

The district court concluded that plaintiffs have no proprietary interest in a job-related promotion exam. However, because we hold that plaintiffs asserted a due process claim based on a liberty interest, and because the due process requirements of a rational relationship between the examination and the job functions of a sergeant are the same in this case, whether plaintiff is recognized to have a liberty or proprietary interest, it is unnecessary for us to determine if plaintiffs have a proprietary interest recognized under state law.

[11] Also compare the burden of proof in a case involving the constitutional standard for adjudicating claims of invidious racial discrimination, on the one hand, and Title VII discriminatory impact claims on the other hand: Under Title VII plaintiff establishes a prima facie case of racial discrimination by merely showing "that the tests in question select applicants for hire or promotion in a racial pattern significantly different from that of the pool of applicants." *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 425, 95 S.Ct. 2362, 2375, 45 L.Ed.2d 280 (1975). The burden then shifts to the defendant to show that the testing system has been validated for job relatedness through proof "by professionally acceptable method" that the testing system is " 'predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated.' " *Id.* at 431, 95 S.Ct. at 2378. The Title VII plaintiff may then attempt to show that the defendant's test validation was merely a pretext by proving "that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest in efficient and trustworthy workmanship.' " *Id.* at 425, 95 S.Ct. at 2375 (citation omitted).

On the other hand, "racial discrimination within the meaning of the equal protection clause could not be demonstrated solely by a racially disproportionate impact. Rather . . . for constitutional purposes it is necessary to show an intent or purpose to dis-

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constitutionally mandated to establish an examination as a requirement for promotion. Constitutional due process requires only that whatever requirements are established by the government must have a rational relation to the job's performance. Once the plaintiff puts into question the rationality of the requirements, the defendants may, but they are not constitutionally required to, articulate the rationality of the requirements by relying on the results of a professional validation study. There is no one method which is required for appropriately evaluating the relationship of an employment requirement to job performance.[12] *Washington v. Davis*, 426 U.S. at 247, 96 S.Ct. at 2051.

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[11] *continued*
criminate by reason of race. Thus, the Court has differentiated between the standard necessary to prove a violation of Title VII and the standard required under the Constitution. Under Title VII, a disproportionate racial impact remains enough to establish a prima facie case while under the Constitution evidence of intention must be proved." *United States v. City of Chicago*, 549 F.2d 415, 435 (7th Cir. 1977), *citing*, *Washington v. Davis*, 426 U.S. 229, 238-39, 96 S.Ct. 2040, 2046-47, 48 L.Ed.2d 597 (1976).

[12] The inquiry as to the rational relationship of a promotion examination to job performance is not limited to equal protection claims based on adverse racial impact. The district court was incorrect to assume that the inquiry as to the validity of the promotion examination is limited to claims of adverse racial impact. The district court placed too heavy a reliance on EEOC "Guidelines" which provide that "use of a selection procedure is in compliance with these guidelines . . . *if such use does not result in adverse impact on any race, sex, or ethnic group.*" 29 CFR § 1807.16, *cited* at note 2 of district court's order (emphasis added by the district court). The EEOC guidelines focus on racial impact because they are the enforcing agency's administrative interpretation of Title VII, *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34, 91 S.Ct. 849, 854-55, 28 L.Ed.2d 158 (1971), and Title VII is specifically geared to employment discrimination practices. As we explained, a professional validation study is merely a statutory requirement under Title VII, but it is not a constitutional requirement. However, an examination allegedly lacking in a personal relationship to the functions of the job to which it is geared is not foreclosed from constitutional due process inquiry for having

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The distinction elucidated between constitutional claims under the Fifth and Fourteenth Amendments and a Title VII claim, is crucial because, unlike under Title VII, the inquiry in the instant case, resting solely on alleged violation of constitutional due process, should not focus on the quality of a particular validation study, or on the availability of other employment selection procedures that would have a less discriminatory impact. *Id.* at 247-48, 96 S.Ct. at 2051. In the instant case, plaintiffs may not simply challenge the quality of the validation study without showing a lack of rational basis between the promotion requirements and a sergeant's job functions. In the due process context, there is no basis for courts to inquire as to whether or not a particular promotion method is most efficacious. And if defendants choose to articulate the rationale of the established procedures by depending on a validation study, it is not open to judicial inquiry whether a different validation study would have been superior. The judicial inquiry is over once a rational basis between the requirements and the job's functions is shown.

IV

While in the usual case the plaintiffs would have the burden of proving a lack of rational connection between the particular promotion examination and the functions of the job sought,[13] in the instant case defendants had the burden of proving that there was no genuine issue of material fact and that they were entitled to a judgment as a matter of law because defendants moved for a summary judgment. *Fed.R.Civ.P.* 56. The record dis-

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[12] *continued*
the distinguishing characteristic of being nondiscriminatory in its alleged irrationality. Whether the rights implicated are based on due process, equal protection, or Title VII, merely affects the burdens of proof.

[13] We agree with the district court that plaintiffs did not sufficiently assert a claim of denial of equal protection.

closes that the defendants articulated a rational relationship between the particular questions challenged in plaintiffs' complaint and the actual job functions of police sergeants.[14] In challenging the motion for summary judgment plaintiffs are not required to prove their contentions, but they are required to present enough specific facts as to raise a genuine issue as to the material issue of the rational relationship between the promotion examination questions and the job functions of police sergeants. *Choudhry v. Jenkins*, 559 F.2d 1085, 1089 (7th Cir. 1977). Thus it was up to the plaintiffs to raise an issue that the examination questions could not rationally guage an examinee's ability to perform the actual functions of police sergeants, or that the asserted functions were not in fact rationally related to a police sergeant's performance. Plaintiffs could not challenge the motion for summary judgment by relying on allegations contained in their complaint or on affidavits that merely stated conclusory allegations, as did the affidavit of the plaintiffs' counsel. *Fed.R.Civ. P.* 56. The only other affidavit submitted by plaintiffs was one from an individual who asserted that he is qualified in psychology and has expertise in analyzing promotional tests for policemen. We conclude that this affidavit did not raise genuine issue as to a fact material to the alleged constitutional violation. The affidavit merely raised an issue as to the quality of the professional validation study conducted to evaluate the promotion examination.

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[14] The defendants' rationale from the record was that: the questions challenged by plaintiffs are job-related in that they were validated for determining intellectual ability, logical deduction, common sense, leadership, and decision-making ability, traits desired of sergeants since they are police supervisory personnel; the "criteria used in developing the test represented major or critical work behavior as revealed by careful job analysis. These critical work behavioral elements were developed by research teams, police chiefs, and division commanders. They were applied to existing sergeants and finally to patrolmen taking promotional examinations for the rank of sergeant. These behavioral elements were tested and retested prior to [the December 10, 1977] test."

But as we emphasized in Part III, defendants are not constitutionally required to conduct a professional validation study of the promotion examination. The facts articulated by the defendants directly addressed the sole material issue of constitutional magnitude in this case, namely the rational relation between the contents of the examination and the job performance of police sergeants. Plaintiffs' affidavits clearly do not raise a genuine issue as to this sole material issue.

V

For the foregoing reasons, the judgment of the district court is affirmed.